United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7180

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7180

TRAMP SHIPPING CO. INC.,

Plaintiff-Appellee,

against

GOTAAS LARSEN A.S., SANKO STEAMSHIP CO., LTD., PARABOLA SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,

Defendants-Appellees,

and against

EMERALD SHIPPING CORP. (LIBERIA),

Defendant-Intervenor-Appellee,

and against

MARDORF PEACH & CO., LTD.,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLEE SANKO STEAMSHIP CO. LTD.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE SANKO STEAMSHIP CO. LTD.

Statement of the Case

This is an appeal by one (1) of six (6) defendants in this case, Mardorf Peach & Co. Ltd. ("Mardorf Peach") from two (2) orders of The Honorable Henry F. Werker,

dated October 16, 1975 and March 9, 1976, made pursuant to Title 9 U.S.C. § 4 & 5, directing Mardorf Peach to proceed to a consolidated arbitration with the plaintiff and the other five (5) defendants.

Issue Presented

Did the District Court properly direct the parties to this action to proceed to a consolidated arbitration where: the disputes between all of the parties arise out of a single incident involving a vessel, of which the plaintiff was owner and all of the defendants charterers; all parties agreed to arbitration and common issues of law and fact are involved in the disputes?

Statement of Facts

In October of 1974, the Greek flag vessel MV AGIA ERINI II (the "Vessel") allegedly sustained damages at or near the port Churchill, Canada, by reason 'unsafe' conditions there prevailing including the 'pressure of ice'. [App. 8a] The Vessel was owned by plaintiff-appellee, Tramp Shipping Company ("Tramp"). The Vessel had proceeded to Churchill while employed under a charter party dated September 13, 1974, between defendant-appellee, Himoff Maritime Enterprises, Ltd. ("Himoff") as owner, and defendant-appellee, Mardorf Peach & Co. Ltd. ("Mardorf") as charterer (the "Mardorf Charter") [App. 25a]. The charter arrangement between Himoff and Mardorf was the last in a chain of charters covering the Vessel at that time. These charters were as follows:

1. Time Charter, dated December 18, 1969, between Tramp, as owner, and Emerald Shipping Corporation ("Emerald") as charterer (defendant-appellee, Gotaas Larsen A.S. ("Gotaas") was later substituted, as charterer, for Emerald and subsequently the charter was reassigned

by Gotaas to Emerald) (the "Gotaas-Emerald Charter") [App. 12a].

2. Time Charter, dated February 22, 1974, between Emerald, as time chartered owner, and defendant-appellee, The Sanko Steamship Company Ltd. ("Sanko"), as charterer (the "Sanko Charter") [App. 36a].

3. Time Charter, dated June 12, 1974, between Sanko, as time-chartered owner, and Parabola Shipping U.K. Ltd. ("Parabola"), as charterer (the "Parabola Charter") [App. 39a].

4. Time Charter, dated September 13, 1974, between Parabola, as time chartered owner, and Himoff, as charterer (the "Himoff Charter"). The Himoff Charter was an oral charter 'identical with' the Parabola Charter [App. 154a].

5. The Mardorf Charter.

All of the charters cited above, including the Mardorf Charter, contained Produce Exchange Arbitration Clauses [App. 12a and 25a lines 107-109], and each contains the following common clauses:

> "6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that charterers or their agent may direct provided the vessel can safely lie always afloat at any time of tide.
>
> 25. The vessel shall not be required to enter any ice-bound port, or any port where lights or light ships have been or are about to be withdrawn by reason of ice, or where the risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging."
>
> [App. 12a and 25a, lines 68-69, 167-169]

On March 27, 1975, Tramp filed a complaint, alleging that the damage sustained by the vessel was the result of 'negligence' and 'breach of warranties' and naming Gotaas, Sanko, Parabola, Himoff and Mardorf as defendants (Emerald subsequently intervened as a defendant). The complaint alleged damages of $2,700,000 and prayed, *inter alia,* for an order compelling all defendants to arbitrate in a consolidated arbitration. Answers and in some cases crossclaims, were subsequently interposed by Gotaas, Emerald, Sanko, Himoff and Parabola.

On July 1, 1975 Tramp filed motion papers seeking an order pursuant to Title 9 U.S.C. Sec. 4 compelling all defendants to proceed to arbitration in a consolidated proceeding.

On July 30, 1975, Mardorf filed a motion seeking to dismiss the cross-claim of Himoff and vacate service of process on it. While this motion was pending, Judge Werker filed a memorandum directing all parties, save for Mardorf, to proceed to a consolidated arbitration before a panel of five (5) arbitrators. The Court further directed Himoff to 'perfect jurisdiction over Mardorf' (App. 64a-67a).

On August 19, 1975, Mardorf's motion to dismiss Himoff's cross-complaint against it and to vacate service of process was denied by Judge Werker. Mardorf moved to reargue and on October 21, 1975, Judge Werker filed a memorandum adhering to his original decision and directing Mardorf to proceed to arbitration in the consolidated proceeding. The parties were directed to settle an order accordingly, however, due to an appeal by Tramp on the issue of the composition of the arbitration panel (subsequently withdrawn) the order was not filed until March 9, 1976. This appeal ensued.

Summary of Argument

The District Court has the power to order a consolidated arbitration in appropriate cases. In this case the disputes between all the parties arise from a single casualty involving a vessel with respect to which all parties have a contractual relationship. The disputes between all parties necessarily involve common issues of fact pertaining to the casualty and at the very least there are common issues of law in the disputes between the plaintiff and five (5) of the defendants, arising from the "safe berth clause" and the "ice clauses" in the Tramp, Gotaas, Sanko, Parabola and Himoff Charters. If there is a different legal issue raised by the Mardorf Peach Charter, it is intertwined with the common facts of the overall disputes and capable of resolution in a consolidated proceeding. The arguments in favor of a consolidated arbitration i.e. savings of time and money and elimination of the risk of conflicting awards outweigh any minor inconvenience it may cause to Mardorf. Mardorf Peach's arguments on this appeal in opposition to consolidation are without merit in law or in fact.

ARGUMENT

POINT I

The District Court has the requisite power to direct consolidated arbitrations and in the circumstances of this case properly exercised such power.

That the District Court has the power to order a consolidated arbitration in appropriate circumstances is settled, such power deriving from Fed. R. Civ. P., Rules 42(a) and 81(a)(3) *and* the "liberal purposes" of the Federal Arbitration Act itself. *Compania Espanola de Pet., S.A.* v. *Nereus Ship.*, 527 F.2d 966, 975 (2d Cir. 1975). The only issue is whether consolidation was appropriate in this case.

There is no argument but that the claims and cross claims of the parties which have been ordered to arbitrate in a consolidated proceeding arise out of a single event i.e. the alleged groundings of the Vessel at the port of Churchill in October 1974. The causes of those groundings and the quantum of consequent damages present common issues of fact for the trier. All of the sub-charterers, save for Mardorf, admit that their Charters are so similar that common issues of law as well as fact are involved. Mardorf while not denying that there are common issues of fact involved, seeks to avoid consolidation by asserting that the Mardorf Charter is in some respects different from the other subcharters and therefore, presents a different issue of law (See Appellant's Brief pp. 14-15). Assuming arguendo that the terms of the Mardorf Charter presents an issue of law distinct from those flowing from the other sub-charters, this is not a ground upon which consolidation should be denied.

The wording of Rule 42(a) does not require that as a prerequisite to consolidation the disputes or actions involve common questions of law *and* fact but rather common questions of law *or* fact. Consolidation for trial has been ordered in cases arising out of a single accident where the legal rights and duties of the parties involved were widely divergent. *Ikerd* v. *Lapworth,* 435 F.2d 197, 204 (7th Cir. 1970), and similarly consolidated arbitrations. *Stein, Hall & Co.* v. *Scindia Steam Nav. Co. Ltd.,* 264 F.Supp. 499, 501 (SDNY 1967). Inherent in the Mardorf argument is the contention that commercial arbitrators will not be able to discern a difference between Mardorf's position and that of the other parties. But this argument has been rejected by the District Court, *Insco Lines Ltd.* v. *Cypromar Navigation Company Ltd. and Seaboard Overseas, Ltd.,* 1975 AMC 2233, 2235-6 (SDNY 1975) (not officially reported). The speciousness of Mardorf's argument in this regard is pointed up by the fact that the arbitration clause in the Mardorf Charter, as in all the other charters, provides for

'commercial men'. See *Vigo Corp. (Marship Corp. of Monrovia)*, 26 NY2d 157, 162 (1970).

In the case at bar the same witnesses and documentary evidence will be used to establish what happened at Churchill whether there is one arbitration or five. It would be an uncommon squandering of time and money to hold five separate arbitrations, to establish a single set of facts and after all of that run the risk of inconsistent awards. Since each party in the chain would rationally wish to wait to see the result of the arbitration preceding its own, before proceeding itself, separate arbitrations could delay a final determination of the issues for several years. (Over two (2) years will have elapsed since the incident when this appeal is argued.) In these circumstances, the unnecessary expenditures of time and resources and the risk of inconsistent findings which would obtain if separate arbitrations were held far outweigh any small inconvenience that Mardorf might suffer in a consolidated arbitration. *Compania Espanola de Pet., S.A.* v. *Nereus Ship.*, supra, at pg. 974; *Stein, Hall & Co.* v. *Scindia Steam Nav. Co. Ltd.*, supra., at pg. 501; *Matter of Arbitration between Czarnikow-Rionda and Eddie Steamship Company Ltd.*, 1975 A.M.C. 1116, 1119 (SDNY 1975) (not officially reported).

POINT II

The appellant's arguments are without merit.

A. The Application of Rule 42(a) F.R. Civ.P.

Mardorf has apparently abandoned its contention that the District Court lacked personal jurisdiction over it. (This was raised by Mardorf at the pre-argument conference.) However, in its place equally frivolous arguments are now raised. The first of these is found in Point II of Appellant's Brief where it is said that consolidation must fail because Rule 42(a) requires that 'actions' must be pending in order to permit consolidation and since no

actions were pending in this case consolidation could not be ordered.

It is indeed difficult to answer a proposition that is so obviously devoid of merit. In the first place an action was pending when consolidation was ordered. The action that was pending sought an order compelling the parties to proceed to a consolidated arbitration [App. 7a-11a]. What Mardorf characterizes as a 'dragnet' complaint was in fact a pleading designed to promote judicial economy. Further, although the power of the District Court to consolidate arbitration derives, in part, from Rule 42(a), there is no reason or authority for the proposition that in proceedings to enforce arbitration agreements the letter of that Rule must be followed. It is the purpose of Rule 42(a) i.e. judicial economy, that the Courts have applied to proceedings under the Federal Arbitration Act for consolidation taken together with the 'liberal purposes' of that Act. *Compania Espanola de Pet., S.A.* v. *Nereus Ship., supra,* at pg. 975. See also *Robinson* v. *Warner,* 370 F. Supp. 828, 830-31 (D.R.I. 1974).

B. Himoff's Failure To Move Under Title 9 U.S.C. § 4 Against Mardorf.

The approach taken by Mardorf in Point VII would make even a seventeenth century common law pleader blush. Clearly, the prayer contained in the Himoff cross-claim against Mardorf was sufficient to put Mardorf on notice that Himoff was seeking judicial aid to enforce its arbitration agreement with Mardorf [App. 24a]. Indeed, the Court of Appeals for this Circuit has approved an order for consolidated arbitration in an action for declaratory judgment where all of the parties were before the Court but none had even sought judicial enforcement of an arbitration agreement. *Compania Espanola de Pet., S.A.* v. *Nereus Ship., supra,* at pp. 971, 974.

C. The Effect Of The Himoff Bankruptcy and The Lack of Privity Arguments.

Defendant-appellee, Sanko, endorses and adopts the arguments contained in the brief of defendant-appellees, Gotaas and Emerald (pp. 12-16) directed to the contentions found in Points IV, V and VI of Mardorf's Brief.

CONCLUSION

The orders of the District Court appealed from should be in all respects affirmed.

Dated: September 27, 1976.

Respectfully submitted,

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